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**IN THE
COURT OF APPEALS OF INDIANA**

JASON SCHAPKER,)	
)	
Appellant-Defendant,)	
)	
vs.)	No. 55A05-0606-CR-338
)	
STATE OF INDIANA,)	
)	
Appellee-Plaintiff.)	

APPEAL FROM THE MORGAN SUPERIOR COURT
The Honorable Jane Spencer Craney, Judge
Cause No. 55D03-0508-FB-198

February 9, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

Jason Schapker challenges the sentence imposed following his plea of guilty to Class B felony child molesting. We affirm.

Issue

Schapker raises one issue for our review, which we restate as whether the trial court properly sentenced him.

Facts

On August 14, 2005, eighteen-year-old Schapker attended a friend's graduation party in Brooklyn, Indiana. While he was there, Schapker went into a bedroom where several children were playing. Schapker then lifted up three-year-old J.B.'s diaper and inserted his finger into her vagina.

The State charged Schapker with one count of Class B felony child molesting and one count of Class C felony child molesting. On February 2, 2006, Schapker pled guilty to the Class B felony in an "open" plea. The trial court found two aggravating circumstances—the young age of the victim and the fact that the molestation occurred in front of other children. The trial court also found two mitigating circumstances—the fact that Schapker had an insignificant criminal history and that Schapker was only eighteen years old at the time of the offense. The trial court did not assign any mitigating weight to the fact that Schapker has a learning disability or that he said he was sorry for his actions.

The trial court sentenced Schapker to twelve years, four of which it suspended. Schapker now appeals.

Analysis

Schapker first challenges the trial court's identification as aggravating the fact that Schapker molested J.B. in front of other children. Schapker argues that this aggravator constitutes judicial fact finding and runs afoul of the United States Supreme Court's holding in Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531 (2004), because the trial court used it to "enhance" Schapker's sentence. He further contends that the trial court erroneously found the victim's young age to be an aggravator and that the aggravating circumstances do not outweigh the mitigating circumstances.

On April 25, 2005, Indiana's "advisory" sentencing statutes became effective and rendered would-be Blakely arguments inappropriate by eliminating "presumptive" sentences and establishing a range of permissible sentences. As the State correctly points out, Schapker's case is governed by the new sentencing statutes because he committed his crime after the date on which they took effect. "In the absence of any argument as to why Blakely should apply to a trial court's findings of aggravators to impose a sentence exceeding a non-binding 'advisory' term, as opposed to a 'presumptive' term, we decline to address the issue any further." Gibson v. State, 856 N.E.2d 142, 146 (Ind. Ct. App. 2006).

The Blakely argument aside, Schapker's contention that the trial court improperly sentenced him based on its finding of aggravators and weighing of mitigators and aggravators presents us with a bit of a dilemma. As we noted in Gibson,

[Blakely’s] after-effects are still felt because the new statutes raise a new set of questions as to the respective roles of trial and appellate courts in sentencing, the necessity of a trial court continuing to issue sentencing statements, and appellate review of a trial court’s finding of aggravators and mitigators under a scheme where the trial court does not have to find aggravators or mitigators to impose any sentence within the statutory range for an offense, including the maximum sentence. The continued validity or relevance of well-established case law developed under the old “presumptive” sentencing scheme is unclear.

Id.

In Gibson, we first noted the difficulties we face in reviewing sentences issued under the new statutes, specifically that “under the current version of [the sentencing statutes], trial courts may impose any sentence that is statutorily and constitutionally permissible ‘regardless of the presence or absence of aggravating circumstances or mitigating circumstances.’” Id. (quoting Anglemyer v. State, 845 N.E.2d 1087, 1090 (Ind. Ct. App. 2006), trans. granted). We then reviewed the mitigators and aggravators found by the trial court in that case and used our conclusions about their propriety as a barometer for assessing the appropriateness of Gibson’s sentence. After identifying several errors in the trial court’s sentencing statement, we scrutinized Gibson’s sentence according to our authority under Indiana Appellate Rule 7(B) to determine whether it was “inappropriate in light of the nature of the offense and his character.” Id. at 149. Until we receive a directive from our supreme court dictating a more specific framework under which to review sentences, we follow the model set out in Gibson.

The trial court made the following statements regarding Schapker’s sentence:

As for mitigating circumstances, the Defendant has one prior brush with the juvenile system, which was handled informally, and he was 18 at the time of the offense. As far as aggravating circumstances, I do feel that the age of the child, even though it is in the statute, it is far below and should be given some consideration. But not only that, the fact that it was performed in from of several other children is offensive, and I consider that aggravating. I also believe this was surreptitiously committed and that there had to be some sort of plan for him to be in that room with these three children and to do what he did. I am specifically not making a finding about remorse because he mentioned he was remorseful for his family first and the victim's family second, so I'm not considering that a mitigating or an aggravator. He is very high functioning for someone that has his scores, and I find his learning disability had nothing to do with this. Therefore, I don't consider that a mitigator at all

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The aggravators and the mitigators actually are .. I'm calling it even in this case because it's .. I'm giving him slightly under .. well, I'm executing slightly under. I'm giving him 12, so.. Yes. I do find the aggravators to be .. to outweigh the mitigators primarily because it was committed in the presence of other children.

Tr. pp. 33-34, 41. We conclude that the aggravators found by the trial court were proper.

Schapker first argues that because age is a material element of the offense, the trial court improperly found J.B.'s young age to be an aggravator. Indiana Code Section 35-42-4-3 prohibits sexual intercourse or deviate sexual conduct with a child under the age of fourteen. Indeed, the fact that J.B. was three years old proves an essential element of the crime. However, a trial court may consider the age of a victim of child molesting as an aggravator when it notes the victim was of "particularly tender years." Kien v. State, 782 N.E.2d 398, 414 (Ind. Ct. App. 2003), trans. denied. J.B. was a mere three years old

at the time Schapker molested her, and in identifying this aggravating circumstance the trial court highlighted her tender age. This is a valid aggravator.

The trial court next gave aggravating weight to the nature and circumstances of Schapker's molestation of J.B. noting that it took place in the presence of other children.¹ The nature and circumstances of the crime are appropriately considered as an aggravator. See Settles v. State, 791 N.E.2d 812, 814 (Ind. Ct. App. 2003). Our supreme court has described the "nature and circumstances" aggravator as relating to "particularly heinous facts or situations." Id. at 815 (quoting Vasquez v. State, 762 N.E.2d 92, 97 (Ind. 2001)). To molest a child in the presence of other children is to add insult to injury. Not only did Schapker commit this crime under circumstances that could cause J.B. to feel embarrassment and shame, but his actions may well have negatively affected the children who witnessed the crime. Based on the facts before the trial court, this is a properly found and significant aggravator.

Schapker does not challenge the trial court's declination to give his learning disability or his remorse mitigating weight. Therefore, the only mitigators found by the trial court are Schapker's lack of a significant criminal history and his young age.

We also note, however, that the trial court made no mention of the fact that Schapker entered into a guilty plea, a fact that Indiana courts have long recognized as

¹ In its appellee's brief, the State characterizes this statement by the trial court as constituting a finding of two aggravators: "it was performed in front of several other children I also believe this was surreptitiously committed and that there had to be some sort of plan for him to be in that room with these three children and to do what he did." Tr. p. 33-34. We believe the trial court's comment about Schapker surreptitiously committing the molestation was merely commentary about the nature and circumstances of the crime—i.e. that it was committed in front of other children—and was not the identification of another aggravator.

being a mitigator. See Scott v. State, 840 N.E.2d 376, 383 (Ind. Ct. App. 2006), trans. denied. The mitigating weight of a defendant's guilty plea may differ from case to case, however. Gibson, 856 N.E.2d at 148. During Schapker's sentencing hearing, the State argued that Schapker's guilty plea was not entitled to a great deal of mitigating weight because Schapker's confession would have been admissible evidence during a trial. Despite that fact, Schapker's plea did provide a benefit to the State by saving it the expense of a trial, and we conclude that his plea is entitled to mitigating weight. See Scott, 840 N.E.2d at 383.

We next address whether, given the nature of the offense and Schapker's character, Schapker's sentence is appropriate. See Ind. Appellate Rule 7(B). At the time he molested J.B., Schapker was an eighteen-year-old high school student who had an insignificant criminal history, and did not suffer from any debilitating learning disabilities. On the day of the crime, he entered a bedroom in friend's home where several children were playing and molested three-year-old J.B. Schapker later pled guilty.

Schapker committed a heinous crime, and he did so in a manner that had the potential to further humiliate the victim and scar several other children. Although, until this point, Schapker appears to have been largely law-abiding, we do not believe he should be awarded a great deal of mitigating weight for (for the most part) doing what is expected of all citizens and acting as the law requires. To his credit, however, he plead guilty in this case. Nonetheless, we conclude that his twelve-year sentence is appropriate here.

We assign significant aggravating weight to the young age of the victim in this case and to the nature and circumstances of Schapker's crime. We conclude, however, that these aggravators outweigh the mitigators found by the trial court—that Schapker was a young man with an insignificant criminal history—and by the fact that he pled guilty. A twelve-year sentence is appropriate given the nature of the offense and Schapker's character.

Conclusion

Schapker's twelve-year sentence is appropriate. We affirm.

Affirmed.

SULLIVAN, J., and ROBB, J., concur.